No. 2080

In the

United States Circuit Court of Appeals

For the Ninth Circuit

R. WOODLAND GATES,

Appellant,

vs.

COLUMBIA-KNICKERBOCKER TRUST COMPANY, a Corporation, Trustee,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA.

BRIEF FOR APPELLANT

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and

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FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

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BRIEF FOR APPELLANT.

About March 21, 1913 Joseph Gutman and many others filed their separate suits against the Pacific Reclamation Company and the Metropolis Improvement Company, both corporations, asking for the appointment of a Receiver, the sale of the property and the distribution of the proceeds of the sale among those entitled thereto.

Thereafter R. Woodland Gates, appellant here, by permission of the Court, filed his Bill in Intervention. The Columbia-Knickerbocker Trust Company, a corporation, Trustee, appellee here, also an intervenor below, moved "to dismiss and strike" the Bill of Intervention and this motion prevailed. Sometime thereafter the Intervenor Gates filed another or *amended* Bill in Intervention (See Transcript of Record—"The Court" p. 58). This latter Bill in Intervention, the Appellee, Columbia-Knickerbocker Trust Company also moved to "dismiss and strike" and more particularly paragraphs XIV and XX thereof and "that portion of the prayer in which the Intervenor Gates claims a lien on 480 acres of land described in said petition in Intervention."

This latter "motion to dismiss and strike" was granted and it is from the order granting this motion that this case is now on appeal in this Court.

STATEMENT OF THE CASE.

For the purpose of the demurrer or the "motion to dismiss and strike" which is now before this Court the allegations of the last Bill in Intervention, must, we perceive, be taken as true.

The substantial allegations of the Bill are:

That between the 18th of August, 1911, and the 1st of March, 1913, the intervenor, Gates, appellant here, performed services in prosecuting certain suits in the General Land

Office, Department of the Interior, in canceling and advising the defendant (The Pacific Reclamation Co.) and attending in and about the business of the defendant, as follows:

(*a*) Involving relinquishments of eight parcels of land involving script location covering eight separate tracts.

(*b*) Involving hearing before and conference with the Department of the Interior, the Assistant Attorney-General and the Interior Department.

The bill further alleges that the reasonable value of the service is the sum of $25,000 and the Intervenor, Gates, claims, by virtue of these services, a lien under paragraph 5376 of the Revised Laws of Nevada, being Section 434 of the Practice Act which reads as follows:

"The compensation of an attorney and counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counter-claim, the attorney who appears for a party has a lien upon his client's cause of action or counter-claim which attaches *to a verdict, report, decision or judgment in his client's favor*, and the proceeds thereof, in whosoever hands they may come, cannot be affected by any settlement between the parties before or after judgment. There shall be allowed to the prevailing party in any action or special proceeding in the nature of an action in the Supreme Court and District Courts, his costs and necessary disbursements in the action or special proceeding."

Specifically the Columbia-Knickerbocker Trust Company moved to strike Paragraph XIV of the Bill in Intervention which reads as follows:

"XIV. And with respect to the said pretended rights of the said Knickerbocker Trust Company, trustee, intervenor

alleges that at the time said trust deed was made by the said Pacific Reclamation Company to said Columbia-Knickerbocker Trust Company, said Pacific Reclamation Company was in no wise the owner of the land involved in the so-called "Bacon cases" herein (16) referred to, and which comprise the said 480 acres of land obtained later through the labor and efforts of said intervenor for said Pacific Reclamation Company and that the rights, interests and claims of the said Columbia-Knickerbocker Trust Company, if any there be, are subject and subsequent to the lien and interest of this intervenor in the land involved in the said "Bacon cases," so-called, aggregating 480 acres, herein and heretofore described."

And Paragraph XX in words following:

"XX. Your intervenor further alleges that, as the attorney and counsellor of said Pacific Reclamation Company in commencing actions and prosecuting suits before the General Land Office and before the Department of Interior, and the secretary thereof, he claims and is entitled, under and pursuant to the terms and provisions of Paragraph 5376 of the Revised Laws of Nevada (1912) being section 434 of "An Act to regulate proceedings" etc.—to a lien upon the 480 acres of land, heretofore particularly described and which said land was the land involved in what is herein known as the "Bacon cases"—in the sum of $25,000 for and on account of services performed and rendered by him for and on behalf of the Pacific Reclamation Company before the General Land Office and the Department of the Interior of the United States—said services having been more fully and particularly hereinbefore described—upon an agreement by the said Pacific Reclamation Company to and with the said R. Wooland Gates, Intervenor herein, to pay to said Gates a reasonable sum for his services rendered in said General Land Office and said Department of the Interior."

And they further moved to strike that portion of the prayer of the Bill of Intervention in which the Intervenor Gates, appellant here, claims a lien on 480 acres of land described in the bill in intervention.

SPECIFICATIONS OF ERROR.

The appellant relies upon and urges, as grounds for reversal of the judgment of the District Court, the following as error:

I.

That the District Court erred in sustaining the motion to strike paragraph XIV and XX of the second Bill of Intervention of R. Woodland Gates or any part thereof.

II.

That the District Court erred in sustaining the motion to strike "also that portion of the prayer hereof in which the petitioner claims a lien on the 480 acres of land described in Paragraph XIV of said petition," for the following reasons, to-wit:

1. That the allegations of the Bill in Intervention show that the 480 acres of land in question were obtained through the efforts and labor of R. Woodland Gates, as an attorney and counsellor at law.

2. That by virtue of his services as such attorney and counsellor at law in this behalf, appellant Gates has a lien on the 480 acres of land in question under Section 5376 of the Revised Laws of Nevada (1912.)

ARGUMENT.

Simply speaking, the appellant contends by the allegations of his Bill—admittedly true for the purposes of this argument—that he performed certain services before the General Land Office and the Department of the Interior—each, as he con-

tends, a quasi judicial tribunal and a Court of Record;—that much of the land in question—some four hundred and eighty acres—made valuable by improvement—was obtained for the Pacific Reclamation Company through his professional efforts and labor, and that he is entitled to a lien for his professional services so rendered.

Aside from paragraphs XIV and XX of the new or *amended* Bill in Intervention, which was filed November 21, 1914 and accepted by the Court as an amended Bill (see Transcript Record, p. 58) which it was sought to strike "upon the ground that it appears on the face of the Bill that the same is insufficient in fact to constitute a valid cause of action in equity or in any manner to entitle said intervenor, R. Woodland Gates, to the relief prayed for and further that the allegations in said paragraphs of said Bill of Intervention and in said prayer fail to set forth matters sufficient to entitle intervenor, R. Woodland Gates to the relief prayed for or any relief at all against the Columbia-Knickerbocker Trust Company, Trustee" and which were stricken by order of the Court, the new or amended Bill in Intervention (see Transcript of Record, p. 15) contains in its several paragraphs some very pertinent allegations—important and salient to a degree in this argument.

Turning now to Paragraph XIV and XX (Transcript of Record, pp. 23 and 25) let us ask:

Wherein are they objectionable?

Now as to Paragraph XIV—it recites that at the time the trust deed was made to the Columbia-Knickerbocker Trust

Company, Trustee, the Pacific Reclamation Company was not the owner of the 480 acres of land afterwards obtained for the Reclamation Company through the labor and professional efforts of the appellant Gates—and that for that reason the claims of the Columbia-Knickerbocker Trust Company, if any there be, are inferior to and subject to that of R. Woodland Gates. The forepart of the paragraph is certainly nothing more than a true statement of the facts; and while the latter part of it might be subjected to the objection that it is a conclusion of law—it is intended merely as a recital that, in point of time, the appellant Gates has a prior right to protection.

As to Paragraph XX—to that paragraph the real objection of the appellee is directed—and for obvious reasons. (See Transcript of Record, Par. XX, p. 25.)

It would seem that appellee here, movants below, have gone far afield in their attempt to becloud the issues and the real rights of the Intervenor, appellant Gates, for their demurrer on "motion to dismiss and strike" practically excepts to Gates' work and services being recognized and paid for out of the fund which he, Gates, made, albeit appellee seeks to reap the benefits of Gates' work and labor and the proceeds of the fund his efforts have produced.

Has Gates the appellant a lien or can he claim one?

There is no case on record, so far as we have been able to discover on all fours with the case at bar; but there is one akin to it, which, we believe, by analogy at least, can be brought squarely within its purview.

In Kappler vs. Sumpter, 33 Appeal Cases (D. C.), at page 408, Mr. Chief Justice Shepard very aptly observes:

"It is argued by appellants that by the terms of the act of Congress, they are entitled to a lien upon the land which the parties may receive through their restoration to the rolls as members of the Indian tribes, and which they may lose the benefit of under this order. Granting the existence of such a lien, it could not be enforced in the pending action by any order therein; nor could it be taken away.

"It seems that all such contracts with Indians are subject to the supervision and allowance of the Secretary of the Interior. All of the attorneys will probably have to go before him for a final approval and settlement of their contracts and claims for fees. And there is nothing in the orders complained of that would preclude inquiry by him into the several contracts of the attorneys, and the allowance of the same as may appeal fair and just, to the full extent of the discretion committed to him by Congress in such matters. But, if the secretary have no such discretionary power under the law, the parties will not be deprived of their remedies *in the courts having jurisdiction in the premises.*"

Judicial cognizance will be taken of the fact that the Bureau of Indian Affairs and the General Land Office, are subdepartments, so to speak, of the Department of Interior; and that each, in its own proper sphere, bears the same relation to the Department of the Interior, as the other.

If this decision of Chief Justice Shepard is the law—we have a lien but could not enforce it in the Department of the Interior "as the Secretary has no such discretionary power under the law"—but we shall not be "deprived of our remedy or remedies in the *Courts having jurisdiction in the premises.*"

Had not the District Court, then, jurisdiction of the matter and is not that the forum for its adjudication?

In view of the decision in Kappler vs. Sumpter, supra, the right of action accrues then and if Judge Shepard's views reflect the law—and we know of nothing to the contrary—we certainly have the right to follow the fund—which, but for the labors of Gates, would not now be in Court in any form. It would certainly be inequitable after the labor had been performed by Gates and the result had been achieved and the fund produced—that the Columbia-Knickerbocker Trust Company should be allowed to absorb the fund, or any portion of it, which justly and honestly belongs to Gates. How can the Columbia-Knickerbocker Trust Company be heard, in a Court of equity, to except to Gates' work and services being paid for out of the fund realized by his labor and efforts when they, themselves, are seeking by every means known to law or equity, to reap the benefit of that very work and labor and the proceeds of the fund which Gates created.

It will not be gainsaid by any solicitor or counsel connected in any way with the main litigation in this case that the primary purpose of the Receivership in this case, as shown by the allegations as set forth in the original Bill in Equity filed by Gutman et al—was not because of the insolvency of the Pacific Reclamation Company, inasmuch as it has resources of over a million and a quarter of dollars,—but rather to protect certain water rights and to re-adjust stock issues by a reorganization of the body corporate. The bondholders—the aqqellee—know this.

Apropos of this law of reorganization, the late Mr. Justice

Lamar, speaking for the Supreme Court of the United States in the case of Northern Pacific Railway Company against Boyd, 228 U. S. 501 very tersely observes:

"Corporations, insolvent or financially embarassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a nonassenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company."

In that case it will be seen, therefore, that the lien, entrenched in the 1896 judgment obtained by Spaulding, flowed to Boyd, and that Boyd's lien followed the fund from the Coeur D'Alene Railroad and Navigation Company, to the Northern Pacific Railroad Company and many years afterwards, even though in misshapen form, to the property of the Northern Pacific Railway Company wherein it found permanent lodgment by the decision of Mr. Justice Lamar.

We contend, therefore, that if the legal plan of reorganization would not and could not cut out Gates—certainly Equity will not lend its hand to deprive him of the fruits admittedly of his labor.

An instructive case upon this subject is that of Davis v. Gemell, (73 Md. 530) wherein the opinion was delivered by Judge McSherry.

There, one William A. Brydon, a majority stockholder of the North Branch Company, recovered judgment against the Baltimore & Ohio R. R. Co., and the judgment, amounting with interest to more than $100,000, was, afterwards, entered to the use of Henry G. Davis & Co. Brydon had employed Messrs. Walsh, Poe and Carter, as attorneys, to bring and conduct the litigation, upon a contingent fee, based upon a certain percentage of the amount recovered, and they secured the judgment.

Before the judgment was paid, Gemell and others, minority stockholders of said North Branch Company, through other attorneys, (Cross and Marbury) filed suit in equity claiming that the judgment belonged to said North Branch Company and not to Brydon individually, although Brydon had recovered the judgment in his individual name. After litigation, that claim was sustained, and the Court appointed a receiver and ordered the amount of the judgment distributed to the stockholders of the North Branch Company, refusing to decree its payment to the company itself because of the fraudulent acts of the majority stockholder. Two claims for attorney's services were there presented in connection with the distribution: Walsh, Poe and Carter claimed their agreed contract compensation out of the fund; Cross and Marbury claimed compensation for preserving the fund to all of the stockholders,

under employment by minority stockholders, as above; and both claims were allowed by the Court, the former upon the percentage fixed by the contract, and the latter upon a *quantum meruit.*

Gemell and others objected to the payment, out of said fund, of fee to Walsh, Poe and Carter; but the Court of Appeals of Maryland overruled the objection, thus stating:

"*But for the labors* of these counsel no fund would now be in court as the result of that litigation. They acted in the utmost good faith through the whole controversy. It is inequitable after the labor has been performed and the result has been achieved that Gemell and Sinclair should be allowed to absorb that portion of the fund which, under Brydon's contract with his counsel, justly and honestly belongs to the latter. * * * They cannot now be heard in a *Court of equity to except to that work being paid out of the fund realized by the labor of these gentlemen, especially when they themselves, these expectants, are seeking to reap the benefit of that very work and labor.* We think the Court was clearly right in allowing these fees as a preferred claim."

As to the allowance of fee to Cross & Marbury, out of the same fund, the same Court thus stated:

"Somewhat similar principle is applicable, although we are unable, after many consultations, to agree with the Judge of the Circuit Court as to the amount to which these gentlemen are entitled. Their labor resulted in preserving the fund for the North Branch Company. * * * This is also a preferred claim upon the fund in Court."

A similar principle was applied, and upheld by the Supreme Court of the United States, in the case of Trustees v. Greenough (105 U. S. 527) in an opinion by Mr. Justice Bradley. In that case, one Vose, a large holder of bonds of the Florida

Railroad Company filed suit, on behalf of himself and the other bondholders, against one Reed and others, trustees, alleging mismanagement, wasting of funds, etc. The appeal presented the question of the propriety of certain allowances made to Vose out of the trust funds; some of the items of allowance including costs and fees paid attorneys in conducting certain litigation in New York; it being contended that such allowances were improper because Vose was not before the Court in the character of a trustee, and therefore, not entitled to reimbursement of his expenses beyond taxable costs.

The Court there thus stated:

"A considerable amount of money was realized and dividends have been made amongst the bondholders, most of whom came in and took the benefit of the litigation. Vose, the complainant, bore the whole burden of this litigation."

In 1875 Vose filed a petition, set forth his advances and the efforts made by him and prayed an allowance out of the fund for his expenses and service. The matter was referred to a master who, in part, found as follows:

"I further find and report that peculiar and great personal services have been rendered by the petitioner, Francis Vose, in the work of protecting the internal improvement and their sinking funds; those services extending over a period of more than eleven years. By the instrumentality of the suits already mentioned as having been instituted by him, by the agencies he employed and sustained and by his own vigilence and personal efforts he has saved from spoiliation and subjected to the decrees of this court a vast domain of over ten millions of acres of land; and has brought into this court large sums of money, which, from time to time, have been distributed by its orders."

And the court goes on further and says:

"As to the point made by the appellants, that the complainant is only a creditor, seeking satisfaction of his debt, and cannot be regarded in the light of a trustee and, therefore, is not entitled to an allowance for any expenses or counsel fees beyond taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But, in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done, and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings; if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust* and to have secured its proper application to their use. There is no doubt, from the evidence, that besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made. *It would be very hard on him to turn him away without any allowance except the paltry sum which could be* taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. *He has worked for them as well as for himself;* and if he cannot be re-imbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution."

And the Court further adds:

"But the complainant was not a trustee. He was a creditor, suing on behalf of himself and other creditors for his and their own benefit and advantage. The reasons which apply to

his expenditures, in carrying on the suit and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and of reliable character and business capacity to accept the office of trustee. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support."

Speaking in the case of the Central Railroad etc., etc. Co. vs. Pettus, 113 U. S., page 916, Mr. Justice Harlan says:

"It thus appears that, by the suit instituted by Branch Sons & Co., and others, the property was brought under the direct control of the Court, to be administered for *all* entitled to share the fruits of the litigation."

In the case at bar, had it not been for the labor of Mr. Gates no property to speak of could have been brought under the control of this court.

And in the same case Mr. Justice Harlan, continuing says:

"The Court below did not err in declaring a lien upon the property in question, to secure such compensation as appellees were entitled to receive; for, according to the law of Alabama, by one of whose courts the original decree was rendered, and by which law this question must be determined, an attorney at law, or solicitor in chancery has a lien upon a judgment or decree obtained for a client to the extent the latter has agreed to pay him; or, if there has been no specific agreement for compensation, to the extent to which he is entitled to recover,

viz: Reasonable compensation for the services rendered. Ex parte Lehman, 59 Ala. 632; Warfield v. Campbell, 38 Id., 527. That lien could not be defeated by the corporations which owned the property purchasing the claims that were filed by creditors under the decree. The lien of the solicitors rests, by the law of that State, upon the basis that he is to be regarded as an assignee of the judgment or decree, to the extent of his fees, from the date of its rendition."

And in the case of In re Gillaspie, 190 Fed. page 91, Judge Dayton very well says:

"The only proper cases that can arise where courts of equity and bankruptcy as well can award compensation to an attorney out of funds due others than his client is where, as I have heretofore indicated, such an attorney for one of a class has "created" or secured a fund and brought it into the custody of the court, which fund is to inure, not alone to the benefit of his client, but to that of all those belonging to this class. In such cases the courts award compensations to the attorney out of the fund due to all, *not on the theory of his having an attorney's lien, but on the broader theory that all interested in the fund should contribute ratably to the cost of "creating" or securing it.* These principles are very clearly set forth in Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478; Jefferson Hotel Co. v. Brumbaugh, (4th Circuit) 94 C. C. A. 279, 168 Fed. 867."

Viewed from any reasonable or legal standpoint we feel that the "motion to dismiss and strike" the second Bill in Intervention of R. Woodland Gates, appellant here, should have been denied and we, therefore, request a reversal of the order or judgment appealed from.

Respectfully submitted,

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